Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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81-663

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. DENNIS, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Government brought to trial seven defendants on a six-count indictment, alleging a single scheme to defraud. Five counts and five defendants were subsequently dismissed, leaving only the petitioner and another for the jury's ultimate consideration on one count of the indictment.

1. Whether defendant is denied his rights to trial by an impartial jury and to effective assistance of counsel in a case where the jury hears evidence on six counts, five of which the government knew, or should have known, were fatally deficient.

2. Whether defendant is denied his right to Due Process where the jury hears evidence on six counts, five of which the government knew, or should have known, were fatally deficient.

3. Whether a conviction on one count of a multi-count, multi-defendant indictment is a *per se* denial of right to a fair trial where every other count and co-defendant has been dismissed by the close of the government's case.

4. Whether a conviction on one count of a multi-count indictment is a *per se* denial of Due Process where the government brings six counts alleging a single scheme to defraud but all counts except one are dismissed after testimony during the trial.

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OPINIONS BELOW

The opinion of the Court of Appeals, reported as *United States* v. *James H. Dennis, Sr.*, 645 F.2d 517 (5th Cir. 1981), appears in the Appendix attached hereto. The Court of Appeals denied the petition for rehearing in a per curiam order dated August 10, 1981, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 22, 1981. A timely petition for rehearing was denied without opinion on August 10, 1981. On August 20, 1981, the Fifth Circuit entered its order denying a stay of the mandate pending the filing of a petition for writ of certiorari.

Thereafter, Petitioner filed in this Honorable Court a timely application for a stay of mandate on August 27,

1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or

artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 8, Federal Rules of Criminal Procedure:

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Federal Rules of Criminal Procedure:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

On July 6, 1979, a Federal Grand Jury, sitting in and for the Northern District of Alabama, indicted seven individual defendants in ten counts charging a variety of fraudulent activities. Jurisdiction of the District Court was authorized by 18 U.S.C. § 3231.

The defendants, James H. Dennis, Sr. (the petitioner herein), Doyce Alon Ballenger, Herman Tavis Mulvehill, Charles Ralph Henson, Michael K. Terebecki, James Anthony Shadix, and Max Gurley, were charged with participating in a series of acts which were part of an overall scheme to defraud Itel Corporation.

In 1978, James H. Dennis, via Dennis Mining and Equipment Company, Inc., was in the business of supplying coal mining companies in northern Alabama with materials and equipment and was also involved in the purchase and renovation of used equipment for resale. Itel Capital Corporation (hereafter "Itel"), whose principal office is in San Francisco, was in the business of equipment leasing. Itel receives capital from equity investors to finance the purchase of equipment which is then leased to third parties. The investors receive a tax credit, a depreciation deduction over the life of the equipment, interest and a capital return on the investment. When Itel expanded into heavy equipment leasing, Jack Adams became their field representative for Alabama. Adams represented Itel in all transactions involving Dennis.

Counts 1 through 6 charged Dennis, Ballenger, Mulvehill, Henson and Terebecki with a series of transactions constituting a scheme to defraud Itel in violation of 18 U.S.C. §§1341 and 1343, alleging that Dennis, in combination with one or more defendants, sold Itel equipment which did not exist or did not belong to Dennis. Appendix, p. 2a.

Counts 7 through 10 charged Dennis, Mulvehill, Shadix and Gurley with making false statements to banks in violation of 18 U.S.C. §§1014 and 2. These counts were clearly unrelated to the scheme charged in counts 1-6 and were severed by the court before trial.

On the eve of trial, the government acknowledged that it could not prove the required mailing necessary to sustain jurisdiction on count 6. Before the jury was impaneled, the government moved for dismissal of count 6 without prejudice. Dennis objected unless it were dismissed with prejudice but the motion was denied; thereafter, the prosecution discussed the count in its opening statement and following the opening statement, count 6 was dismissed with prejudice. During the first week of the trial, defendant Henson was dismissed from count 4. After two more weeks, count 3 was dismissed and defendant Ballenger was dismissed from count 1. At the conclusion of all the testimony, counts 1, 2 and 4 and defendant Mulvehill were dismissed. Appendix, p. 4a.

Thus, after three and a half weeks of evidence concerning six counts and four defendants, the jury's deliberations narrowed to count 5 and Dennis and Terebecki only. Both were convicted. Dennis received a four year custodial sentence and Terebecki a suspended one year sentence and one year probation. Terebecki's conviction was reversed by the Court of Appeals in the same opinion which affirmed Dennis' conviction.

Throughout the trial and as counts and defendants were dismissed, petitioner made timely motions for severance and for mistrial.

Count 5 (the count resulting in conviction) alleged that Dennis and Terebecki committed fraud in connection with the sale of an oil processing plant which they sold but did not own. In his testimony, Dennis maintained that Itel enlisted his help in Alabama to acquire heavy equipment, thereby "placing" investor funds and generating return on investment by lease payment. To maximize tax benefits, Itel could not purchase equipment directly from the same person they leased it to, so a

third party was necessary for the maximization of tax benefits. (Tr. 3102-3104). Dennis was to be the lessee of the oil plant once he assisted Itel in purchasing it. The oil plant belonged to Bob Sivley, an acquaintance of Mulvehill and had been for sale for some time. (Tr. 2454-2456). Sivley testified that Mulvehill had his permission to show it (Tr. 2457).

Dennis contended that Itel was well aware that neither he nor Terebecki owned the plant at the time the package of financing documents was signed. Rather, the documents were to generate the cash necessary to buy the plant from Sivley. Sivley's plant had been for sale for $185,000.00, and Dennis hoped to acquire it with Itel's money for Itel and make a substantial profit in the process (Tr. 2452-2457). Dennis contended further that after he received the money, Sivley failed to consummate the sale because of the FBI investigation which led to the indictment of the defendants.

During arguments on petitioner's severance motions and throughout the trial, the prosecution maintained that the separate counts were components of a single, indivisible scheme to defraud. The trial court agreed, at least to the extent that the averments facially alleged a series of acts comprising a common, indivisible scheme; consequently, it overruled defendants' numerous motions concerning the impropriety of joinder under *Rules 8* and *14* of the Federal Rules of Criminal Procedure. As a result, the jury heard evidence of alleged forgeries, of falsified financial statements, of questionable serial numbers, and other prejudicial evidence of a million dollar fraud wholly unrelated to count 5.

After the government acknowledged that the required "mailing" was absent as to count 6, it included remarks about that part of the scheme in its opening statement.

Defendant's objections were sustained but the prejudice resulting from the government's flawed indictment and proof began to cumulate. (Tr. 148-165). Evidence of alleged fraud was also offered on count 3 when the government knew, or should have known, that it would not prove the essential mailing with respect to that count either.

Halfway through the trial, when cross-examination began to reveal that there were insufficient misrepresentations to prove fraud, the court delivered, *sua sponte*, a lengthy instruction regarding the role of Itel's employees in the alleged "scam." The charge was that of "aiders and abettors" and uncharged parties. The court implored them not to consider the guilt of any unindicted parties (*i.e.*, Jack Adams of Itel) or let it distract them that such persons had not been indicted. (Tr. 1800-1803). Petitioner's motions for mistrial became so insistent regarding the cumulating and impacting prejudice that a "continuing motion" was acknowledged and reserved by the court until the close of the case.

The jurors had been given copies of the complete, six-count indictment on which to make notes during trial. Over objection, the jury retired to deliberate on count 5 with their notes concerning the entire indictment including the dismissed counts. (Tr. 3878-3879). The court remarked, ". . . , I felt like that we've got to sink or swim with those counts before them." (Tr. 3879).

On appeal, the court agreed that "the indictment discloses a scheme to defraud a single victim, Itel, over a period of six months. All of the transactions in counts 1 through 6 involved a basic plan of selling to Itel equipment to which the defendants had either no control or no title." Appendix, p. 6a. Thus, the Fifth Circuit held the initial joinder proper, and, in deciding whether at any

time during the trial joinder became prejudicial, the court remarked that it would not impose its more acute hindsight on the trial court. The court held that the actions of the lower court in refusing to order a severance did not abuse its discretion and, irrespective, found that any error with respect to Dennis was probably harmless.

The court found no design on the part of the prosecution to unduly prejudice the jury in presenting evidence on the five failed counts. The court noted that the evidence against Dennis on count 5 is overwhelming, and it *may* be that even without the joinder of counts, evidence as to *some* of the other transactions would be admissible . . ." Appendix, p. 7a. (emphasis supplied). As for the trial court's *sua sponte* instruction regarding the role of Itel's employees in the "scam," the court noted that that "incident alone [we do not think] amounts to an impermissible comment on the evidence." Appendix, p. 9a.

REASONS FOR GRANTING THE WRIT

I. The Intentional Joinder In A Six-Count Indictment Of Five Fatally Defective Counts Violates A Defendant's Fifth Amendment Right To Due Process Of Law Where The Government Contends That Each Count Is Part Of A Single Scheme To Defraud.

The presumption of innocence is a fundamental tenet of our system of criminal jurisprudence. The presumption is a matter both of law and of fact. A defendant has an absolute right to a fair trial. *Brown* v. *United States*, 411 U.S. 223 (1973); *McGautha* v. *California*, 402 U.S. 183 (1971). In order to insure this right, our judicial system emphasizes that the guilt of an accused is to be determined solely on the basis of the evidence introduced against him at trial and not by proof of prior crimes or misconduct. *See, e.g., Hudson* v. *North Carolina*, 362 U.S. 697, 702-703 (1960); *United States* v. *Beasley*, 519 F.2d 233 (5th Cir. 1975).

Petitioner does not criticize the trial court for allowing the prosecution the opportunity to prove its case. The gravamen of petitioner's complaint stems from the cumulative prejudice which resulted from the evidence permitted by the allegations of the six-count indictment. The volume of irrelevant proof so tainted the trial that the nisi prius judge once remarked, in chambers: "Well, I'd like to say that [the government has proved a colossal fraud against Mr. Dennis but lost jurisdiction on those failed counts], and to be perfectly frank from a 'P.R.' standpoint, I would like to tell the jury that . . ." (Tr. 3758-3759). If the court was so convinced of a "colossal" fraud, could the jury honestly be expected to overcome or ignore the irreparable prejudice? The answer of the Court of Appeals was that *some* of the evidence *may* have been admissible anyway — even without joinder of six counts. We submit that the evidence would *not* have been admissible. The jurors were instructed not to consider the evidence with respect to the dismissed counts and the fiction indulged by the trial and appellate court is that they did not.

If the result legitimated and endorsed by the courts herein is allowed to stand, others will suffer a similar fate from prosecutors and prosecutions unfettered by meaningful constraints and encouraged by indulgent courts. The stratagem of joining unprovable and provable counts not only forces the defendant to answer the defective but also to combat prejudicially irrelevant evidence introduced by prosecutors who will expect that juries will be instructed to forget or ignore theories and evidence selected and offered for its prejudicial value.

In reviewing the myriad of cases considering joinder, petitioner has found none raising the issue of fundamental Due Process in the context of this case. An assertion of intentional misconduct is here raised in the context of

the prosecution's responsibility for the natural and probable consequences of its actions — its decision to allege and force to trial fatally defective counts under the banner of a single indivisible scheme to defraud. Some restraint must be imposed and guidelines promulgated delineating and defining parameters beyond which the prosecution may neither design or scheme with impunity.

Within the criminal justice system there is a growing awareness that intentional prosecutorial misconduct should not be sanctioned. Recent decisions concerning grand jury proceedings are exemplary. Most recently a 13 count indictment for conspiracy and "kickback schemes" was dismissed for misconduct by the prosecutor before the Grand Jury by United States District Court Judge Manual L. Real in *United States* v. *Sears, Roebuck and Co.,* (U.S.D.C. Cal. 80-103; June, 1981). See also, *United States* v. *Estepa,* 471 F.2d 1132 (2nd Cir. 1974) (excessive hearsay); and, *United States* v. *Basurto,* 492 F.2d 781 (9th Cir. 1974) (use of perjured testimony). Dismissal of the indictment due to deliberate governmental misconduct is used as a prophylactic tool to discourage future similar conduct. "The nature of the conduct must be such to convince the court of the need for a deterrent against similar conduct in future investigations and prosecutions." *United States* v. *Houghton,* 554 F.2d 1219 (1st Cir.), *cert. denied* 434 U.S. 851 (1977).

Rule 8 of the Federal Rules of Criminal Procedure provides a powerful and facile tool which allowed the prosecutor herein the medium of a multi-count indictment asserting a "series" of similar acts or transactions whose nexus was an indivisible, fraudulent "scheme," asserted by the government (see Brief for Appellee, pp. 3, 13-14), recognized by the trial court (Tr. 3754-3759, and 3739-3740), and sanctioned by the Fifth Circuit Court of Appeals. (Opinion appended, p. 1a).

Petitioner submits that his review of the multifarious cases considering error in the wake of failed theories of proof resulting in dismissals or acquittals of defendants (and even "successful" prosecutions) reveals no adequate or definable standard for the prosecutorial function beyond "intent," and no safeguards protecting defendant from the natural and probable consequences of unsuccessful but nonetheless highly prejudicial strategies. While the concepts of "wantonness," "gross negligence" and "negligence" have been proposed as alternative standards, no established boundary has been placed upon the seemingly unfettered prosecutorial discretion in development, characterization and trial presentation of criminal matters other than that the prosecutor technically and literally follow the dictates of *Rule 8* in framing the allegations of the indictment. The prosecution must be constrained by something more than an acknowledgement that everyone must "sink or swim with those counts before them." (Tr. p. 3879).

Petitioner submits that the issue presented herein did not result from his own doing; nor did his counsel sit idly by hoping to trap the court into reversible error. Instead, counsel offered suggestions in pre-trial proceedings, predicted at the inception, and railed throughout the trial against the very failures and impending prejudice which did result. The numerous and continuous objections and motions for mistrial were converted early-on to "continuing" reservations of the issues by the court. This posture existed for the final two thousand (2,000) pages (the last one-half) of testimony which yielded the very result complained of — unnecessary, inescapable and constitutionally impermissible prejudice.

Is the Due Process Clause of the Fifth Amendment subordinate to *Rules 8* and *14* of the Federal Rules of Criminal Procedure? The Panel Opinion below failed to

reach the broad issue re-asserted herein, and instead analyzed the Petitioner's plight within the limited context of *Rules 8* and *14*. Both trial and appellate courts ignored or were unconcerned with the fact that several counts were dismissed because the government could not even prove the "mailing" which was essential to federal jurisdiction. We must assume that the government had investigated its case. We further assume that the Grand Jury would not have returned a fatally flawed indictment unless they were mislead by non-testimonial assurances from a prosecutor who then knew that no mailing could be proven. Surely the mailing was the first fact investigated. Jurisdiction is a fundamental concern in *every* federal case. Did the government proceed knowing that the case could not be proven?

The Panel predictably found *Rule 8* satisfied because the government used the right connective words, whether the transactions were actually provable or not. The general considerations of *Rule 14* were next applied by the appellate court with the usual result. The fear of using hindsight, coupled with the awful burden of proving substantial prejudice, and the desire not to find an "abuse of discretion" prevented reversal. This enigma has become the "catch 22" of prosecutorial overreaching: the ability to draft a document that is facially sufficient, with no corresponding duty to prove the "series" of "connected" criminal acts alleged.

The foundation underlying the sacred guarantees of the Bill of Rights requires individualized consideration of criminality which is implicit in the Presumption to Innocence and Burden of Proof. These safeguards of our liberty have given way to policy considerations which, in principle, may be rational but as applied, undermine the fundamental fabric of our unique criminal justice system. Neither history nor experience reveal to the trial lawyer

any known antidote for the virulent and malignant prejudice resulting from the failed stratagem found herein.

We, therefore, ask for the promulgation of a *per se* rule: When the prosecutorial device of a multi-count indictment results in the judicially dictated failure of all counts but one, the remaining count must be dismissed for retrial. Short of a confession, the prosecutor's intent must be inferred from the circumstances of his actions. Allowing the prosecutor to parade a myriad of near-sins and engender an image of colossal fraud to insure a conviction should be constitutionally repulsive. Due Process, the Burden of Proof, and the Presumption of Innocence, surely embrace *some* notion of restraint, accountability, inhibition, deterrence, dissuasion, discipline, control or restriction upon the prosecutor. Criminal trials must not degenerate into trial by ordeal, bad character or any of the other horrors of similar sort from which our forefathers fled to lead a revolution. The Bill of Rights makes our system of Criminal Jurisprudence special and unique; it must not be subverted and its protections progressively diminished in the interest of expediency, economy or because of indifference.

II. The Intentional Joinder In A Six-Count Indictment Of Five Fatally Defective Counts Violates Defendant's Sixth Amendment Right To A Fair Trial And Effective Assistance Of Counsel Where The Government Contends That Each Count Is Part Of A Single Scheme To Defraud A Single Victim.

In all criminal trials, the defendant is cloaked with a presumption of innocence which, although not specifically articulated in the Constitution, is a fundamental and basic component of our criminal justice system, *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). In order to protect and maintain this presumption of innocence, the courts must be conscious of the factors which may undermine the

fairness of the fact-finding process. "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle* v. *Williams*, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976).

The conception of what constitutes the preservation of one's presumption of innocence is often expressed as an arena where "no insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissable evidence and permissible argument." *United States* v. *Dawson*, 563 F.2d 149, 151 (5th Cir. 1977); *Brooks* v. *Texas*, 381 F.2d 619, 624 (5th Cir. 1967). However, in many trials the jury is expected to overcome a certain amount of prejudicial evidence or events.

> Trials are rarely, if ever, perfect and improprieties of argument by counsel to the jury do not call for a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury.

United States v. *Homer*, 545 F.2d 864, 867 (3d. Cir. 1976), *cert. denied*, 431 U.S. 954; *United States* v. *Leftwich*, 461 F.2d 586, 590 (3rd Cir.), *cert. denied*, 409 U.S. 915 (1972).

When proof of a multi-count indictment is presented to the finders of fact and failed counts are dismissed thereafter, courts frequently indulge in the fiction that a curative instruction will cause the jury to forget facts and matters which the prosecution was endeavoring to make indelible and unforgettable. Although the proof or evidence is both unforgettable and prejudicial, appellate courts oftimes look back in hindsight and find it harmless. The propriety of discretionary decisions by trial

courts has been elevated almost to the status of a presumption by appellate courts unwilling to indulge the convicted criminal defendant, particularly at the expense of the trial court.

Occasionally, courts find that the quantum of prejudice in a trial transcends that level which our sensibilities deem permissible. In determining whether the prejudice interjected by the prosecutor "taints" the trial and jury, it is necessary to turn to a "totality of circumstances" test. Each case must be individually examined to ascertain how much prejudice was introduced into the trial and whether it was enough to constitute reversible error. An individual's right to a fair trial can be violated without a showing of identifiable prejudice if the totality of circumstances warrants it. *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Glenn* v. *Missouri,* 341 F.Supp. 1055 (E.D. Missouri, 1972).

In determining the degree of malignancy and virulence of the prejudice in a given situation, courts examine the nature of the allegations, the weight and effect of the failed evidence and the manner in which it was conveyed to the jury. Reversal of a conviction is necessary when the prosecutor's intentional conduct introduces immaterial or erroneous information into the jury's deliberative process which they cannot disregard even with prompt instruction. "When jurors consider material not introduced into evidence, the conviction must be reversed unless it is clear that the material was not prejudicial." *United States* v. *Renteria,* 625 F.2d 1279 (5th Cir. 1980); *Farese* v. *United States,* 428 F.2d 178 (5th Cir., 1970).

The prosecutor herein compelled all participants — court and jury as well as prosecutor and defendant — to

contend with *fundamentally* unprovable allegations concerning a single overall scheme to repeatedly defraud a single victim. The reluctant trial court, thoroughly persuaded by the prosecution's powerful proof as to failed counts, observed that "everyone had to sink or swim with those counts before them." (Tr. p. 3879). In truth, only the defendant had to sink or swim and he clearly sank.

Why should the prosecution be rewarded for its failures? Why should every excuse be made for and every indulgence granted the substantially unworthy prosecution?

The "catch-22" of the multi-count indictment is that the prosecutor is allowed to plunge the defendant, the court and the jury into the complicated, admittedly prejudicial unfair trial created by the multi-count, multi-defendant indictment. The prosecution can proceed with impunity in the multi-count case because he is not required to prove facially prejudicial allegations. The prosecutor, who has already interviewed the witnesses, investigated the case and framed the allegations, is not sanctioned even though his theory and proof are fundamentally, if not intentionally, flawed. Our examination of reported decisions indicated that appellate courts rarely (and then only reluctantly) find that the cumulative effect of the prosecutor's stratagem reaches the point of reversible error.

The unique matters then to be addressed are: Will the prosecutor who drafts fundamentally unprovable allegations be constrained? What level of misconduct *will* justify a reversal for retrial in a forum purged of failed theories and irrelevant evidence? Are the natural and probable consequences of failed stratagem even subject to redress?

The level of conduct that will not be tolerated in the Fifth Circuit has sometimes been called "prosecutorial overreaching." *United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979), speaks to this concept:

> "[U]nder ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. But the Supreme Court recognizes that there may be exceptions to that rule — rare cases involving circumstances which are 'attributable to prosecutorial * * * overreaching . . .'
>
> Where 'prosecutorial overreaching' is present, the interest protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction . . .
>
> *To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,'* caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to reasonably conclude that a *continuation of the tainted proceeding would result in a conviction.* 606 F.2d at 547 (quoting *United States* v. *Kessler,*" 530 F.2d 1246 (5th Cir. 1976). (Emphasis supplied)).

Significantly, we find no rules against the foreseeable yet inescapable prejudice from failed theories and evidence, or any other integral part of the process where the prosecution is obligated to maintain the integrity of the event which it foisted upon the judicial system. Judges are constrained to exercise their "considered judgment" within the context of the various and difficult problems arising during the trial, and are only reluctantly reversed by appellate courts hesitant to find "abuse of discretion." The unfairness of the resulting trial and the inability of counsel to effectively represent the client compelled to defend in the arena and within the trial context created by such flawed prosecutions surely should be redressed.

Aggressive prosecutors, ever mindful of the limits to which courts will go in trying not to retry the criminally

accused, continue to stretch the rules, always asking for more, rather than less, from increasingly harried courts. Can one reasonably believe or would the prosecutor contend that petitioner herein received a fair trial? Could the jury be expected to forget what they too had heard and rise above the powerful flow of prejudice recognized by the trial court at the conclusion of the government's "case"? Can one say that the trial and jury herein were not "tainted"? The accused in many multi-count, multi-defendant cases increasingly asks the same question and it is no longer rhetorical. When *every* count but one is fundamentally deficient, why should the prosecutor resist a retrial? What overriding policy decision or principle of justice or equity causes courts to reward the erring prosecutor?

We believe the fair trial and effective assistance of counsel guarantees of the Sixth Amendment mandate a *per se* rule requiring a trial in which defense counsel can cope with admissible evidence respecting allegations which the government can support with some testimony on all material elements for a substantial number of the counts in the indictment. The prosecution should not be rewarded, directly or indirectly, when it fails to sustain a prima facie case on every allegation except one in the multi-count indictment. The prosecutor caused the tainted trial and prejudiced jury which convicted to petitioner. Petitioner did not receive a fair trial. Failure to remand for retrial will serve only to enlarge the parameters of prosecutorial overreaching. The courts must begin signaling prosecutors that it intends to delimit and constrain prosecutorial overreaching.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT B

No. 80-7011.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES H. DENNIS, SR., MICHAEL K. TEREBECKI,
Defendants-Appellants.

May 22, 1981.

Defendants were convicted in the United States District Court for the Northern District of Alabama, at Birmingham, James Hughes Hancock, J., in connection with an alleged scheme to defraud a corporation through purchase and sale of equipment, and they appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) joinder of counts and defendants was initally proper; (2) with respect to one defendant, denial of his motions to sever was not an abuse of discretion; (3) with regard to other defendant, there was prejudicial joinder; (4) giving of "unindicted coconspirator" instruction did not amount to impermissible comment on the evidence; (5) one defendant need not have been advised of his constitutional right to remain silent or to have an attorney present; (6) special agent of Federal Bureau of Investigation did not act unethically in interviewing one defendant; and (7) admission of portion of FBI interview with one defendant was not cause for reversal.

Affirmed in part and reversed and remanded in part.

J. Stephen Salter, David Cromwell Johnson, Birmingham, Ala., for Dennis.

James H. Dennis and Michael K. Terebecki, pro se.

Benjamin Daniel, Joseph A. Fawal, Birmingham, Ala., for Terebecki.

Bill L. Barnett, Birmingham, Ala., for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, FAY and VANCE, *Circuit Judges.*

FAY, *Circuit Judge:*

A federal grand jury sitting in the Northern District of Alabama indicted James H. Dennis, Sr. and Michael Terebecki, appellants herein, along with five others in connection with an alleged scheme to defraud a corporation through the purchase and sale of equipment. During trial, five of the six counts, and all but two of the defendants, Dennis and Terebecki, were dismissed. Dennis and Terebecki were convicted for violations of 18 U.S.C. §2 (1976) and 18 U.S.C. §1343 (1976). As grounds for appeal, both assert that joinder was improper as matter of law under Fed.R.Crim.P. 8 or that joinder was prejudicial under Fed.R.Crim.P. 14, and that the trial judge erred in giving certain instrucions and in admitting testimony of an F.B.I. agent. We affirm the conviction of Dennis. Because we find he did not receive a fair trial, we reverse the conviction of Terebecki and remand for a separate trial.

Itel Capital Corporation, a Delaware Corporation with its main offices in San Francisco, is in the business of equipment leasing. It receives capital from equity investors to finance the purchase of equipment which is then leased to third parties. The equity investors receive an investment tax credit, a depreciation deduction over the life of the quipment, and a capital return on the investment. Appellant Dennis operated Dennis Mining and Equipment Company, Inc. and was in the business of supplying coal mining companies in northern Alabama with materials and equipment. Defendant Terebecki was a real estate agent in Birmingham, Alabama. According to the indictment, in 1978, Dennis began a series of transactions with Itel, selling it equipment which either did not exist or did not belong to Dennis. Payments for the equipment were allegedly made through the mail or by wire.

On July 6, 1979, a federal grand jury returned a ten count indictment against Dennis, Terebecki, and five others who had been involved in transactions with Itel.[1] Counts one, two, and three charged Dennis, Herman Tavis Mulvehill, and Doyce Allen Ballenger with schemes to defraud Itel in connection with the purchase of a Chicago pnuematic model 750 drill, a Hough model 400 loader, and two PB83 air compressors. Count four, the only count not naming Dennis, charged Mulvehill and Charles Ralph Henson with defrauding Itel through the purchase of a Chicago model 650 pneumatic drill. Count five charged Dennis and Terebecki with selling to Itel an oil processing plant never in the control or possession of either appellant.[2] Count six named only Dennis and charged he defrauded Itel in connection with another Chicago pneumatic drill.

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[1] This appeal concerns only counts one through six. Counts seven through ten were found to be misjoined under Fed.R.Crim.P. 8(a) and were severed before trial.

[2] Although the statutory violation charged in the indictment was 18 U.S.C. 1341, it became obvious that 18 U.S.C. 1343 was the proper statute. The two are similar except the latter deals with fraud perpetrated by use of wire communications. The statutes involved in count five are as follows:

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

At the trial of counts one through six, the government moved for dismissal of count six without prejudice. Dennis objected to dismissal unless it were with prejudice. On this basis the motion was denied and count six was discussed in the opening statement for the government. Following opening statements, the count was dismissed with prejudice, jeopardy having attached. During the first week of trial, Henson was dismissed from count four. During the third week, count three was dismissed and Ballenger was dismissed fom count one. At the conclusion of all the testimony, counts one, two, and defendant Mulvehill were dismissed. Motions for severance and for mistrial were made at these various times and curative instrucitons were given to the jury. By the time the case went to the jury, only count five, charging Dennis and Terebecki with fraud inconnection with the sale of the oil processing plant, remained. Dennis and Terebecki were found guilty as charged under the indictment, and Dennis received a four year custodial sentence. Terebecki received a one year probationary sentence and was required to return $10,000 allegedly received as a "commission" on the fraudulent sale. Both defendants appeal the entry of judgment.

The evidence showed that Dennis and Terebecki first met in March, 1978, when Dennis purchased a home in Terebecki's neighborhood. Terebecki testified that he thought Dennis was a wealthy and successful businessman, and that Dennis asked him to serve as "escrow agent" for a business deal he was negotiating. Terebecki had no previous dealings with Itel and knew nothing of previous transactions between Dennis and Itel. He was told that his signature was needed to fulfill a technical requirement for Itel.

John E. Adams, Alabama field representative for Itel, testified that in early September, 1978, Dennis informed him that he was interested in purchasing an oil processing plant which belonged to an estate. Adams was told that the necessary documents would be executed by an attorney for the estate having authority to sell. On September 29, 1979, Dennis brought Terebecki to Itel's Birmingham offices. Dennis,

out of Terebecki's hearing, informed Adams that Terebecki was the attorney for the estate and supplied him with a list of the oil processing equipment. The documents were prepared, and a bill of sale was signed by Terebecki. Adams testified that he made no inquiries in regard to the condition of the plant, its value, or pending liens against the equipment, and that Terebecki made no representations to him regareding his authority. Itel transferred $285,000 by wire to Terebecki's account at Central Bank of Birmingham as payment for the plant.

Terebecki testified that he did not represent himself to be an attorney, that he thought his signature was necessary to fulfill a technicality only, and that he did not intend to deceive or mislead anyone. He accepted payment of the $10,000, he said, only after Dennis insisted upon it, and he reported the amount as income on his tax return.

Joinder

Both Dennis and Terebecki have attacked joinder of counts and defendants under Fed.R.Crim.P. 8. Dennis argues that the government neither alleged nor proved a conspiracy linking the five defendants and six counts that ultimately went to trial. Terebecki questions whether the defendants were alleged to have participated in the same series of acts or transactions constituting an offense or offenses as required by the Rule. All agree that improper joinder under Rule 8(b), would be inherently prejudicial. *United States* v. *Nettles*, F.2d 547 (5th Cir. 1978); *United States* v. *Bova*, 493 F.2d 33 (5th Cir. 1974). It is clear that the government need not allege a conspiracy in order to join defendants or counts. Nor need the government charge all defendants in the same count or that each defendant particiapted in the same act. *Evans* v. *United States*, 349 F.2d 653 (5th Cir. 1965). What is required is a series of acts unified by some "substantial identity of facts or participants." *United States* v. *Nettles*, 570 F.2d 547, 551 (5th Cir. 1978); *United States* v. *Marionneaux*, 514 F.2d 1244, 1248-49 (5th Cir.) *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1978).

It appears there is sufficient commonality between transactions alleged in the indictment to justify joinder. The indictment discloses a scheme to defraud a single victim, Itel, over a period of six months. All of the transactions in counts one through six involved a basic plan of selling to Itel equipment to which the defendants had either no control or no title. Both Dennis and Mulvehill were alleged to have been involved in most of the transactions. It cannot be said that as a matter of law joinder was clearly improper. *See United States* v. *Johnston*, 547 F.2d 282 (5th Cir.), *cert. denied*, 431 U.S. 942, 97 S.Ct. 2660, 53 L.Ed2d 261 (1977) (common object to secure money from bank).

Having determined that joinder was initially proper under Rule 8, we must consider whether at any time during trial joinder became prejudicial. It is always easier for an appellate court using hindsight to examine prejudice than for the trial judge embroiled in the midst of trial. For this reason, the standard of review for determining such prejudice is abuse of discretion. *United States* v. *Wasson*, 568 F.2d 1214, 1222 (5th Cir. 1978); *United States* v. *Nettles*, 570 F.2d 547 (5th Cir. 1978). Under this test, the abuse of discretion must be clear. *United States* v. *Rhodes*, 569 F.2d 384 (5th Cir.) 439 U.S. 844, 99 S.Ct. 138, 58 L.Ed.2d 143, (1978) and the defendant must show more than that he thinks he would have a better chance of acquittal if tried in a separate trial. *Tillman* v. *United States*, 406 F.2d 930 (5th Cir.) *vacated* 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969); *see United States* v. *Swanson*, 572 F.2d 523, 528 (5th Cir.), *cert. denied*, 439 U.S. 849, 99 S.Ct. 152, 58 L.Ed.2d 152 (1978).

With respect to Dennis, we hold that denial of his motions to sever was not an abuse of discretion. It is not uncommon for the government to dismiss defendants and counts in a trial; indeed, it has a duty to do so when it finds the evidence is insufficient to support convictions. *United States* v. *DeLucca*, 630 F.2d 294, 298 (5th Cir. 1980) *cert. denied*, ____ U.S. ____, 101 S.Ct. 1520, 67 L.Ed.2d ____ (1981). We see no design on the part of the government to unduly prejudice the

jury. The evidence against Dennis on count five is overwhelming, and it may be that even without the joinder of counts, evidence as to some of the other transactions would be admissible under Fed.R.Evid. 404.

With regard to Terebecki, we find that there was prejudicial joinder. Under our decision in *Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970) and *Tifford* v. *Wainwright*, 588 F.2d 954 (5th Cir. 1979), the court must consider several factors in determining whether to grant severance when a defendant asserts that a codefendant would give exculpatory testimony but for the prejudicial joinder. The record establishes that there was no doubt of Terebecki's desire to call Dennis as a witness. Dennis and his attorney verified his willingness to testify at a separate trial, but Dennis refused to testify at the joint trial unless impeachment with prior crimes were limited. In chambers, the trial judge allowed Dennis to give his sworn testimony, asking Dennis to assume that he was testifying on Terebecki's behalf at a separate proceeding.

In chambers Dennis testified that he had asked Terebecki as a real estate agent, to locate a larger nouse for him and that when Itel's employee Adams said that he would require a third party to consummate the oil plant deal, he asked Terebecki to act as "escrow agent." Dennis testified that neither he nor Adams ever told Terebecki of the true nature of the transaction. He testified that Terebecki was never told that he would receive any payment for his services nor had Terebecki asked for payment. He testified that he insisted that Terebecki keep the $10,000. Dennis concluded his testimony with the following statement: "All I am really trying to present to Your Honor here, truthfully, and under oath is that there is a man here that has no reason to be here and that knew nothing and had nothing to do with it." (Tr. 3110).

The record clearly establishes that the trial court was aware of the difficulty of Dennis' position and that the trial judge thought at the time of the *in camera* testimony that the facts could be brought in by other witnesses. With the 20/20 vision of hindsight, we are able to say that a denial of fundamental

fairness occurred when Terebecki was not allowed to present this testimony to the jury. The dismissal of the other defendants and counts had already highlighted Terebecki's role, yet there was no testimony that Terebecki was aware of the other transactions involving Itel. We do not agree with the government's argument that the evidence against Terebecki with regard to his specific intent to defraud was so overwhelming, that even without the accumulation of evidence on other counts and exclusion of corroborating testimony from Dennis, the jury would have found him guilty beyond a reasonable doubt.

Instructions

Both appellants complain that at one point in the trial the court gave *sua sponte* an instruction regarding the role of Itel's employees in the "scam" and reminded the jury that they were not called upon to return a verdict as to any unindicted parties[3] After the instruction was given, appellants moved for

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[3] The challenged instructions were, in part, as follows:

> You are here as jurors to determine the guilt or innocence of each defendant charged in the Indictment from the evidence presented during the trial of this case and received as to that defendant. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons who you think might also be guilty but are not charged in the Indictment.
>
> So if the evidence in the case convinces you beyond a reasonable doubt of the guilt of a defendant, you should so find, even though you might believe that one or more other persons who are not charged in the Indictment might also be guilty. But if any reasonable doubt remains in your mind as to the guilt of a defendant after an impartial consideration of all of the evidence received as to that defendant during the trial of the case, you should and must acquit that particular defendant.
>
> Also any suggestions of possible involvement of any defendant in any other matters which are not charged against him in the Indictment should not be considered by you while you're in the jury room deliberating.
>
> As I have stated to you earlier, each defendant charged is charged with one or more offenses in the Indictment, and each such offense and evidence applicable thereto should be con-

a mistrial, the government moved to dismiss Henson (count four) and Terebecki moved for dismissal on the ground that the government's cases against Terebecki and Henson were identical. Henson was dismissed and the jury instructed to disregard any testimony relating solely to Henson. Appellants argue that the giving of the "unindicted coconspirator" instruction amounted to a comment on the credibility of a witness and allege that it precluded argument that the harm to Itel was caused by the negligence of its own employees.

We do not think this incident alone amounts to an impermissible comment on the evidence. Such instructions, based upon the need envisioned by the court, are a recognized exercise of the power of the trial judge. *Quercia* v. *United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933); *United States* v. *Cisneros*, 491 F.2d 1068 (5 Cir. 1974). As to Dennis, error would be harmless, and our decision to remand as to Terebecki renders further discussion of this point moot.

F.B.I. Testimony

During presentation of the government's case, a special agent of the F.B.I. was allowed to read to the jury his summ-

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sidered by you separately. The fact that you may find one or all of the accused guilty or not guilty of an offense charged should not control your verdict as to any other offense or accused.

Moreover, it is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Evidence that obviously pertains to only a particular defendant should be disregarded by you entirely with regard to other defendants.

In other words, each defendant is entitled to have his case determined from evidence as to his own acts, statements and conduct, and any other evidence in the case which is received and is applicable to him.

I thought it appropriate at this stage of the trial to give that to you, and you are so instructed, and I will repeat, in essence, the same instructions at the conclusion of the trial. (Tr. p. 1800-1803).

aries of three interviews with Dennis. Dennis argues these statements were confusing and prejudicial and that the circumstances of the interrogation were deceptive in that Dennis was not advised of his constitutional right to remain silent or to have an attorney present. The circumstances of the interviews indicate, howver, that Dennis could not have been considered "in custody". *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *United States* v. *Henry,* 604 F.2d 908 (5th Cir. 1979); *United States* v. *Warren,* 578 F.2d 1058 (5th Cir. 1978) *en banc, cert. denied,* 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980). The record establishes that at the first interview the agent informed Dennis that he was investigating possible wire fraud violations in connection with dealings with Itel. The agent testified that he explained to Dennis that he was not compelled to do or say anything. At the second interview Dennis initiated discussion by inviting the agent into his office when the agent came to the place of business in order to serve a subpoena. The third discussion took place when the agent was taking handwriting samples with the knowledge of Dennis' attorney.

We find Dennis' argument that the F.B.I. agent, a law school graduate, acted unethically to be meritless. An attorney representing a party in a controversy is prohibited from directly contacting the opposing party if he knows that party is represented by counsel. Here, however, the agent was not acting as an attorney and there is no evidence that he was a member of any bar.

Terebecki objects to a portion of the February 27, 1979 statement in which Dennis admitted that he "may have a problem with the oil processing plant . . ." and that to "speed things up" he would be willing to plead guilty if probation were offered to him. (Tr. 2918). Because he could not call Dennis as a witness, Terebecki could not use Dennis to impeach the recall of the agent on this point. Standing alone, this would not be cause for reversal. Our decision to remand obviates the need for a full discussion of this point.

In conclusion we reiterate that the wide angle lens of hindsight admits a more comprehensive view than the closeup lens required at trial. Even the most experienced trial judge may be unable to discern the exact moment when a defendant is prejudiced by being tried with another. Here the record reflects that a very deliberate and conscientious effort was made to caution the jury to disregard evidence going to counts and defendants that were dismissed. With respect to Dennis, we believe the trial was fair. With respect to Terebecki, however, we are of the opinion that he did not receive a fair trial.[4] For this reason the judgment upon jury verdict is AFFIRMED as to Dennis and REVERSED and REMANDED as to Terebecki.

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[4] We, of course, take note that the trial judge could not anticipate the course of trial which resulted in the dismissal of five of the six counts being tried and five of the seven defendants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7011

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES H. DENNIS, SR.,
Defendant-Appellant

Appeals From The United States District Court
For The Northern District Of Alabama

On Petition For Rehearing And
Petition For Rehearing En Banc

FILED Aug. 10 1981

(Opinion May 22, 1981, 5 Cir., 198__, ____ F.2d ____).

(August 10, 1981)

Before TJOFLAT, FAY and VANCE, *Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER FAY
Peter Fay
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CR79-H-183-S

UNITED STATES OF AMERICA,

VS.

JAMES HAROLD DENNIS, SR.

Order To Defendant To Report
To Begin Service Of Sentence

(FILED Aug. 25, 1981)

It appearing that the defendant herein was convicted on a jury verdict of an indictment charging violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, Count Five.

It further appearing that on October 25, 1979, the defendant was sentenced to the custody of the Attorney General of the United States for a period of Four (4) Years; or until otherwise discharged as provided by law, following which the defendant appealed the conviction to the United States Court of Appeals for the Fifth Circuit, which by its decision and opinion dated May 22, 1981, affirmed the verdict and judgment of this court.

It further appearing that the mandate of the Court of Appeals issued on August 20, 1981, and now having been received and filed in the clerk's office of this court, it is therefore

ORDERED and ADJUDGED that the sentence heretofore imposed by this court be placed into full force and effect. The defendant is hereby ORDERED to report directly to the institution as designated by the Bureau of Prisons on Tuesday, September 29, 1981, at such time as indicated by the Bureau of Prisons, to commence service of the sentence. If the defendant should fail, neglect, and refuse to surrender himself

as directed herein, or as otherwise instructed by the United States Marshal on behalf of the Bureau of Prisons, the United States Marshal is hereby authorized to arrest the defendant and take him into custody to carry out the provisions of this order.

DONE this 25th day of August, 1981.

/s/ JAMES H. HANNAH
James H. Hannah
UNITED STATES DISTRICT JUDGE